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Grigor Demirchyan, and Marina Demirchyan

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Consumer Financial Protection
Bureau,

Plaintiff,

v.

D and D Marketing, Inc., d/b/a
T3Leads, Grigor Demirchyan, and
Marina Demirchyan,

Defendants.

Case No. 2:15-cv-09692-PSG(Ex)

Hon. Philip S. Gutierrez

**DEFENDANTS' RESPONSE TO
DAVIT GASPARYAN'S MOTION
TO CONSOLIDATE PRETRIAL
PROCEEDINGS IN RELATED ACTIONS;
MEMORANDUM OF POINTS AND
AUTHORITIES AND DECLARATION OF
HERBERT P. KUNOWSKI IN SUPPORT**

Hearing Date: April 17, 2017
Hearing Time: 1:30 p.m.
Courtroom: 6A
Courthouse: First Street

1 Defendants, D and D Marketing, Inc., d/b/a T3 Leads, Grigor Demirchyan, and
2 Marina Demirchyan (collectively “Defendants”), hereby submit their response to the
3 motion to consolidate pretrial proceedings in related cases, which motion was filed by
4 Defendant, Davit Gasparyan (“Gasparyan”) in (1) the instant case; (2) the case against
5 Gasparyan under this Court’s Case No. 2:16-cv-2725-PSG(Ex); and (3) the case against
6 Defendant, Dmitry Fomichev (“Fomichev”), under this Court’s Case No. 2:16-cv-2724-
7 PSG(Ex). All three cases were brought by Plaintiff, Consumer Financial Protection
8 Bureau (the “Bureau”), as separate actions in this Court.
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12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. PREFATORY STATEMENT**

14 As a preliminary matter, Defendants note that Gasparyan’s motion to consolidate
15 pretrial proceedings was electronically filed improperly on February 14 in the separate
16 cases against Defendants and Fomichev, without administratively creating Gasparyan as
17 a “new party” in those two cases, such that it appears in the Court’s dockets therein as if
18 Defendants and Fomichev are the moving parties, which they are not. Nevertheless,
19 Defendants note in this response that they are not opposing the specific relief sought by
20 Gasparyan to consolidate *pretrial proceedings, including discovery*. However, as set
21 forth herein, they do vigorously oppose and object to consolidation *for all purposes,*
22 *including trial*, which the Bureau has requested in its early response filed on February 17
23 to Gasparyan’s motion.
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1 In that regard, Defendants also note here that despite the Bureau knowing that
2 Gasparian's motion was filed in all three of its related cases, the Bureau only filed its
3 early response in its case against Gasparian, clearly seeking to prevent Defendants from
4 prematurely knowing, for purposes of their own response, the Bureau's position that it
5 was not only to seeking full consolidation, but also seeking to orchestrate a calculated,
6 preemptive strike against this Court: (1) coordinating the hearings on the motions for
7 certification of appeal and stay in all three cases to March 27; and (2) coordinating the
8 Scheduling Conferences in all three cases to April 27. (See Bureau's Response to
9 Gasparian's Motion to Consolidate, pp.3-4, filed in Bureau's case against Gasparian as
10 D.E. 60 on February 17). Defendants only discovered this subterfuge by checking the
11 docket for the status of the Bureau's separate case against Gasparian, and admonished
12 the Bureau on February 23 to not let this happen again. (See attached Declaration of
13 Kunowski, ¶ 2).

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18 On March 22, the Bureau finally filed its responses to Gasparian's motion in the
19 instant case and in its case against Fomichev, incorporating and attaching as exhibits the
20 same response that it had previously filed in its case against Gasparian, but changing its
21 proposed order from the one that it had previously submitted in its case against
22 Gasparian to reflect that its attempt at a preemptive strike against the Court coordinating
23 matters on the Court's own motion was now moot. (See D.E. 77, 77-1, and 77-2 in the
24 instant case; and D.E. 54, 54-1, and 54-2 in the case against Fomichev).

1 **II. THIS COURT SHOULD REJECT THE BUREAU’S REQUEST TO**
 2 **CONSOLIDATE THE THREE RELATED CASES FOR ALL**
 3 **PURPOSES, INCLUDING TRIAL, GIVEN THE RISK OF PREJUDICE**
 4 **AND THE NEED FOR A FAIR AND IMPARTIAL TRIAL**

5 As said, while Defendants do not oppose consolidation solely for purposes of
 6 pretrial proceedings, including discovery, they do vigorously oppose and object to the
 7 Bureau’s request that the cases be consolidated for all purposes, including trial.

8 Notably, the Court’s “discretion to consolidate is not unfettered. Considerations
 9 of convenience and economy must yield to a paramount concern for a fair and impartial
 10 trial.” *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2nd Cir. 1993), *quoting*,
 11 *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284-85 (2nd Cir. 1990), *cert. denied*, 498 U.S.
 12 920, 112 L.Ed.2d 250, 111 S.Ct. 297 (1990). *See, also*, *Flintkote Co. v. Allis-Chalmers*
 13 *Corp.*, 73 F.R.D. 463, 464-65 (S.D.N.Y. 1977) (“consolidation should not be ordered if
 14 it would prejudice defendant, for considerations of convenience and economy must yield
 15 to the interest of justice in a fair and impartial trial.”) Indeed, “[c]are must be taken that
 16 consolidation does not result in unavoidable prejudice or unfair advantage.” *Cantrell v.*
 17 *GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993). In that regard, “it is possible to go too
 18 far in the interests of expediency and to sacrifice basic fairness in the process. *Malcolm*,
 19 995 F.2d at 354. At the same time, consolidation for purposes of pretrial proceedings
 20 only is a recognized alternative to consolidation for all purposes. *Barraford v. T&N Ltd.*,
 21 778 F.3d 258, 263 n.8 (1st Cir. 2015).
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1 Here, the Bureau's position in seeking consolidation for all purposes is expressly
2 designed to prejudice Defendants and gain an unfair advantage at trial - the very factors
3 that weigh against consolidation for all purposes and which this Court must refuse to
4 allow. The Bureau's motivation here is already reflected in this Court's record, with the
5 Bureau seeking to exploit, for its own improper advantage, the litigation pending
6 between Gasparyan and Defendants in the Los Angeles County Superior Court. (See
7 Bureau's Request for Judicial Notice in Support of Opposition to Defendants' Motion to
8 Dismiss, D.E. 49; Declaration of Barry Reiferson in Support of Bureau's Request for
9 Judicial Notice, 49-1). There, the Bureau sought to have this Court take judicial notice
10 of excerpts from the complaint and cross-complaint in those two state court cases arising
11 from the ownership and management of D and D Marketing, Inc.,¹ as well as from
12 deposition testimony in a third state court case between Marina Demirchyan and
13 Fomichev.
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19 In closing monitoring those cases, the Bureau is fully cognizant of the severe
20 animosity and hostility that exists between the defendants that has nothing whatsoever to
21 do with the substance of the Bureau's cases against them. Nevertheless, the Bureau will
22 undoubtedly continue to seek to exploit the internal divisions and adverse positions
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25 ¹ The dockets from those two cases brought in the Los Angeles County Superior Court
26 under Case Nos. BC554306 and BC585895 reveal the extensive pleadings, claims and
27 counterclaims filed in the very heated litigation that was first initiated by Gasparyan
28 against Defendants in August 2014 and includes Fomichev as a party, and which
remains pending to this day. (See Los Angeles County Superior Court dockets available
online under "Case Summary" at www.lacourt.org).

1 taken between them to Defendants' irreversible prejudice should a future consolidated
2 trial take place with them in this Court. Indeed, the Bureau's opposition to Defendants'
3 motion for certification of appeal and stay, as well as its response to Gasparyan's instant
4 motion to consolidate, further reflect the Bureau's strategy to exploit the differences
5 between Defendants, Gasparyan and Fomichev, and attempt to "paint with a broad
6 brush" in attributing alleged misconduct and dilatory tactics to Defendants. (See
7 Declaration of Barry Reiferson in Support of Bureau's Opposition to Motion for
8 Certification of Interlocutory Appeal and Stay, D.E. 73-1; Bureau's Response to
9 Gasparyan's Motion to Consolidate, pp.3-4, filed in Bureau's case against Gasparyan as
10 D.E. 60). This Court can fully expect the Bureau to continue with its calculated effort to
11 prejudice Defendants and obtain an unfair advantage at a consolidated trial should this
12 Court allow consolidation for all purposes here, and must soundly reject the Bureau's
13 attempt to deny Defendants the fair and impartial trial to which they are entitled.
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DECLARATION OF HERBERT P. KUNOWSKI

I, Herbert P. Kunowski, declare as follows:

1. I am an attorney at law duly licensed and admitted to practice before all the courts in the State of California, including this U.S. District Court, and a member of the law firm of Wilson, Elser, Moskowitz, Edelman & Dicker LLP, counsel of record for Defendants, D and D Marketing, Inc., d/b/a T3 Leads, Grigor Demirchyan, and Marina Demirchyan (collectively "Defendants"), in the above-captioned action brought by Plaintiff, Consumer Financial Protection Bureau (the "Bureau"). I have personal knowledge of the matters stated herein, and could and would competently testify to the following under oath.

2. On February 23, 2017, after learning that the Bureau had filed an early response on February 17 to the motion to consolidate pretrial proceedings filed by Defendant, David Gasparyan ("Gasparyan"), and which I only discovered by reviewing this Court's docket for the status of the Bureau's separate case against Gasparyan, I advised the Bureau's counsel, Barry Reiferson, that when the Bureau files a response to a motion that has been filed in all three of its related cases, as with Gasparyan's motion, the Bureau should file its response in its cases against Dmitry Fomichev and my clients as well, and serve all parties, not just Gasparyan, with a copy of the Bureau's position. I noted to Mr. Reiferson that the Bureau had done not do so with its response filed on

1 February 17 to Gasparyan's motion, and requested Mr. Reiferson to ensure that my
2 clients were properly notified in the future.
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4 I declare under penalty of perjury under the laws of the United States of America
5 that the foregoing is true and correct this 27th day of March 2017 at Los Angeles,
6 California.
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9 By: /s/ Herbert P. Kunowski
Herbert P. Kunowski, Declarant
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